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No. 09-1255

In the Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEX.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Texas correctly applied this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), to hold that federally-funded improvements at a railroad crossing pre-empt a state tort law claim.

RULE 29.6 STATEMENT

Union Pacific Railroad Company is the successor to the Missouri Pacific Railroad Company. Union Pacific Railroad Company is the operating subsidiary of Union Pacific Corporation, which is the only publicly traded company owning more than 10% of Union Pacific Railroad Company's stock.

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INTRODUCTION

This Court has twice held that state common law claims related to the adequacy of warning devices at a railroad crossing are pre-empted by federal law when federal funds have participated in the installation of a warning device at a railroad crossing. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352-54 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670-71 (1993).

The decision below is fact-bound and entirely consistent with *Shanklin* and *Easterwood*. Petitioners argue that retroreflective material installed on an existing crossbuck is not itself a "warning device," and that only that upgrade—and not the original crossbuck sign—was paid for with federal funds. But retroreflective tape affixed to a crossbuck is clearly a "marking[] ... located at or in advance of grade crossings" that is designed to warn motorists of the presence of a crossing, and hence qualifies as a warning device under the plain terms of the regulation. 23 C.F.R. § 646.204. Regardless, the application of the tape to a sign effectively "installs" a new and upgraded sign. Petitioners essentially concede that their claims would be pre-empted if the railroad had pulled the sign out of the ground, placed the retroreflective tape on it, and then stuck the sign back in the ground. Federal pre-emption should not turn on such meaningless distinctions.

There is no split of authority in the lower courts. The decisions on which petitioners rely apply settled law to very different factual settings. Nothing in those few decisions suggests that any other appellate court in the Nation (state or federal) would reach a different result on these facts.

At most, the petition points to some tension between the decision below and language in two unpublished district court decisions in Texas on the narrow, fact-bound question of whether retroreflective tape added to Texas crossbucks pursuant to the 1989 Program triggers pre-emption. But subsequent federally-funded upgrades to public passive crossings in Texas have rendered that question virtually academic. The petition should be denied.

STATEMENT OF THE CASE

Statutory and Regulatory Background

1. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents." Pub. L. No. 91-458, § 101, 84 Stat. 971, 971 (1970), codified as amended at 49 U.S.C. § 20101. The FRSA contains an express pre-emption provision, authorizing the Secretary of Transportation to issue regulations for all areas of railroad safety and pre-empting state law covering the same subject matter as a federal regulation. 49 U.S.C. §§ 20103(a), 20106.[1]

In 1973, Congress enacted the Highway Safety Act of 1973, Pub. L. No. 93-87, § 203, 87 Stat. 250, 283, and created the Federal Railway-Highway Crossings Program for the "elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a) ("Crossings Program"). To participate in the Crossings Program, states were required to "conduct and systematically maintain a survey of all highways to identify those

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[1] 49 U.S.C. § 20106 was amended in 2007 to include section (b), which limits the scope of FRSA pre-emption in certain limited circumstances not present here. Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453 (2007).

railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* §130(d). The states and the federal government have significantly reduced grade-crossing accidents, injuries, and fatalities since the Crossings Program was created. From 1980 to 2008, the number of grade-crossing collisions fell 78 percent, injuries associated with collisions fell 76 percent, and fatalities fell 66 percent.[2]

2. The Federal Highway Administration ("FHWA") has promulgated regulations to implement the Crossings Program. As relevant here, those regulations address the adequacy of warning devices where "[f]ederal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i), (b)(4).

Under § 646.214(b)(3), an adequate warning device must include "automatic gates with flashing light signals" (*i.e.*, an "active warning device") if particular conditions are present. Petitioners do not argue that § (b)(3) is applicable here. Subsection (b)(4) provides that "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

By statute, FHWA may not approve the expenditure of federal funds or authorize a project to proceed unless the project will satisfy the appropriate

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[2] *See* Ass'n of Am. Railroads, *Safety, Highway Rail Grade Crossings*, http://www.aar.org/Safety/GradeCrossingSafety/GradeCrossingSafety.aspx (last visited June 9, 2010).

safety requirements: "No funds shall be approved for expenditure ... unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing ...." 23 U.S.C. § 109(e)(1).[3]

2. At the time of Mr. Limmer's accident, the crossing in question was marked by an X-shaped crossbuck sign, which read "RAILROAD CROSSING" and was fitted with retroreflective material that had been installed pursuant to a federally-approved and funded program to upgrade railroad crossings in Texas. Pet. App. 1a, 9a & n.27.

It is undisputed that a reflectorized crossbuck sign, such as the one in place at the Front Street crossing, is a "passive warning device," defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204. "Traffic control device[]" is not defined in the regulations, but is defined in FHWA's *Manual on Uniform Traffic Control Devices* (the "Manual") to include "a sign, signal, marking or other device placed on or adjacent to a street or highway (by the authority of a public body or official having jurisdiction), to regulate, warn, or

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[3] The procedure through which states obtain federal funding for such programs is described in the brief of Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina as *amici curiae* submitted in *Norfolk Southern Railway Co. v. Shanklin*. *See* *Amicus Curiae* Brief of Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina, *Shanklin*, 529 U.S. 344 (2000) (No. 99-132), 1999 WL 1211762, at *8-10.

guide traffic." *See* Manual § 6F (1988 ed. rev. 3, Sept. 3, 1993), *available at* http://www.osha.gov/doc/highway_workzones/muted/index.html.[4]

Easterwood and Shanklin

This Court has held that §§ 646.214(b)(3) and (4) establish federal requirements for grade crossing warning devices and pre-empt any additional state tort law duties. *See Easterwood*, 507 U.S. at 670-71; *Shanklin*, 529 U.S. at 352-54.

In *Easterwood*, the Georgia Department of Transportation had decided to install gates at four railroad crossings. The gates required installation of motion-detection devices, and new circuitry for those devices, at each crossing. The Georgia DOT installed new circuitry at each crossing, and subsequently installed gates at three of the four crossings. Although a gate was also planned for the fourth crossing and federal funds were initially set aside for it, the project was not completed and the funds were reallocated for use in another project.

Adopting the longstanding agency interpretation of § 646.214 and the view of the United States, this Court concluded that the regulation "displace[s] state and private decision-making authority" and "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670. "In short, for projects in which federal funds participate in the installation of warning devices, the

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[4] Petitioners note the Texas Supreme Court's use of the 2003 version of the Manual, which is available at http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf. Pet. 6 n.5. Where, as here, we refer to a different version, the date and an online reference have been provided.

Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Id.* at 671. That federal determination pre-empts any "state law which ... seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings," including tort law. *Id.*

The *Easterwood* Court ultimately held that state tort law was not pre-empted in that particular case, because "[t]he only equipment installed" with federal funds "was the motion-detection circuitry," which without the accompanying gates "does not meet the definition of warning devices" under the regulations. *Id.* at 672. In other words, "the warning devices for which federal funds had been obtained were never actually installed at the crossing where the accident occurred." *Shanklin*, 529 U.S. at 353 (citing *Easterwood*, 507 U.S. at 671–73).

This Court's subsequent decision in *Shanklin* clarified that the touchstone for FRSA pre-emption is FHWA funding of a crossing improvement project. The facts of *Shanklin* were very similar to those at issue in this case. Mr. Shanklin was struck and killed by a train after he drove his truck onto railroad tracks. 529 U.S. at 350. The crossing was marked by reflectorized crossbucks that had been installed using federal funds. *Id.* Mr. Shanklin's widow alleged that the railroad was negligent in failing to maintain adequate warning devices at the crossing, and this Court held her state-law claim pre-empted.

The *Shanklin* Court held that pre-emption does not require proof that federal officials made any "individualized determination" concerning the adequacy of warnings at a particular crossing, and that state law is pre-empted irrespective of whether the

requirements of the federal regulation have been satisfied. *Id.* at 351, 355, 357-58. Echoing the United States's position in *Easterwood*, this Court explained that § 646.214(b) " 'establishes substantive standards for what constitutes adequate safety devices on grade crossing improvement projects financed with federal funds.' " *Id.* at 354 (quoting Br. for United States as *Amicus Curiae* Supporting Affirmance, *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790 and 91-1206), 1992 WL 12012044, at *23 ("U.S. *Easterwood* Br.")). As the United States explained, that is so because "[t]he regulation ... requires FHWA approval of the safety devices .... Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under [the] regulation." U.S. *Easterwood* Br. at *24. If the regulation's requirements have not been satisfied, a plaintiff's remedy (if any) is federal in nature. *Shanklin*, 529 U.S. at 358-59.

Factual Context

The State of Texas implements federally-funded crossing-improvement programs through the Texas Department of Transportation, formerly known as the State Department of Highways and Public Transportation (both "TxDOT").

In 1977, TxDOT implemented a federally-funded program (the "1977 Program") that called for the installation of metal, reflectorized crossbucks at all crossings that did not require an active warning device. Pet. App. 9a.

In 1989, Texas participated in a program designed by FHWA to enhance safety at crossings by adding retroreflective devices to the *back* side of crossbuck signs and posts. FHWA relied on research showing

that 800 accidents each year, about 60 of them fatal, occurred when a motorist runs into the side of a train at night. Pet. App. 113a. FHWA determined that retroreflective devices on the back side of the signs on the far side of the crossing would reflect the driver's headlights back "'through the moving gaps in the train,'" and that "'[t]he resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing.'" Pet. App. 13a. Implementing the 1989 Program, the Texas Legislature required TxDOT to develop guidelines and specifications for the installation of retroreflective material on "all public grade crossings not protected by active warning devices." Tex. Rev. Stat. Ann. art. 6370b, § 2 (Vernon Supp. 1990), codified as amended at Tex. Transp. Code § 471.004. The statute mandated that "retroreflective material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing." *Id.*

Texas received more than $1.3 million in federal funds to implement the 1989 Program. Pet. App. 14a. It is undisputed that the Front Street crossing at issue here was equipped with metal crossbuck warning signs mounted on steel posts, on which reflectorized material had been installed using federal funds pursuant to the 1989 Program. Pet. App. 1a, 9a & n.27.

Additional federally-funded improvements have been made to Texas crossings since the 1989 Program. In 2004, railroads in Texas implemented a federally-funded upgrade program for public passive crossings throughout the state. Under the "Highway Railroad Grade Crossing Crossbuck Sign Assembly Upgrade

Project" ("2004 Program"), existing crossbucks at most public passive crossings were removed and replaced with new crossbuck signs that comply with updated engineering standards.[5] In addition, the State of Texas, working with the railroads, identifies a number of passive crossings every year to be upgraded with lights and gates. *See* 5 RR 157-159, 169 (Nov. 14, 2001 trial transcript); 12 RR 36-37, 80, 86 (Feb. 5, 2002 trial transcript).[6] The pre emptive effect of improvements under the 1989 Program thus remains relevant only to cases involving accidents that either predate the 2004 Program or involve those relatively few crossings that were not updated under the 2004 Program or by the addition of lights and gates. Negligence claims in Texas are subject to a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a).

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[5] The details of the 2004 Program are explained in affidavits and exhibits filed in the summary judgment record in *Jackson v Union Pacific Railroad Company*, in the United States District Court for the Northern District of Texas, Dallas Division. *See, e.g.*, Appendix to Defendants' Motion for Partial Summary Judgment, *Jackson v. Union Pac. R.R. Co.*, No. 3:06-CV-00768-L (N.D. Tex. June 20, 2007), ECF Nos. 17-2 to -7. The 2004 Program was implemented by contracts between TxDOT, the three Class I Railroad Companies, and thirteen Short Line Railroad Companies operating in Texas. *Id.* at 183, ECF No. 17-6 at Page ID 167. Because these facts are relevant not to the legal issues presented here but instead to the jurisprudential importance of the case, the usual limitations on judicial notice do not apply. *See, e.g.*, Fed. R. Evid. 201 advisory committee's notes (describing appropriate judicial consideration of "legislative" as opposed to "adjudicative" facts); *Hart v. Sheahan*, 396 F.3d 887, 894-95 (7th Cir. 2005).

[6] "RR" refers to the court reporter's record in the Texas Supreme Court.

Procedural History

1. Petitioners sued UP for wrongful death, alleging that UP was negligent in failing to protect the crossing with an adequate warning device and in permitting gravel and vegetation to restrict visibility. Pet. App. 1a-2a. UP argued that federal law pre-empts petitioners' claims. Pet. App. 2a. The trial court denied the pre-emption defense and submitted the case to the jury. The jury found for petitioners on both counts, and the trial court entered judgment on the verdict. Pet. App. 76a-78a.

2. The court of appeals reversed, holding that petitioners' obstructed-visibility claim is not an independent basis of liability as a matter of state law and that petitioners' inadequate-warning claim is pre-empted. *See* Appendix 3 to Petition for Review of Petitioner UP, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009) (No. 06-0023) (*Mo. Pac. R.R. Co. v. Limmer*, No. 14-02-00688-CV, 2004 Tex. App. LEXIS 8854 (Tex. App. Oct. 5, 2004)).

More than one year later, the court of appeals granted petitioners' motion for rehearing and reversed its pre-emption ruling, holding that UP had not "conclusively prove[d] that federal funds were expended to install warning devices at the Front Street crossing under the 1977 Program," Pet. App. 49a, and that the federally-funded improvements made to the Front Street crossing pursuant to the 1989 Program did not trigger pre-emption because the retroreflective material installed was not, standing alone, a "warning device," Pet. App. 51a-60a. The court of appeals remanded for a retrial without the improper obstructed-visibility count. Pet. App. 29a.

3. On cross petitions, the Supreme Court of Texas granted review and unanimously held that petitioners' claims are pre-empted by the 1989 Program. Pet. App. 12a, 20a. Consistent with *Easterwood* and *Shanklin*, the court concluded that the "enhancement or maintenance of an existing sign to meet FHWA requirements" using federal funds constitutes federal "approval of 'the type of warning device to be installed' within the meaning of subsection (b) of the Grade Crossing Design regulations," and therefore pre-empts any state law theory that would require additional or inconsistent warning devices. Pet. App. 19a-20a. The court further held that even if enhancement of an existing device *were not* sufficient to trigger pre-emption, "the retroreflective tape was itself a warning device, and its addition to the existing crossbucks [was] an installation" that triggers pre-emption. Pet. App. 20a.

a. The Supreme Court of Texas reached the latter conclusion after carefully considering the purposes of the 1989 Program and the definitions of "warning device" under the state and federal regulations. Pet. App. 12a. The court noted that the federal regulations refer to "traffic control devices" within the definition of "passive warning devices," but do not independently define the term. Pet. App. 14a. Instead, the regulations include a "non-exclusive list of examples," including "'signs, markings, and other devices.'" *Id.* (quoting 23 C.F.R. § 646.204). The court also noted that the term "traffic control device" is defined in the Manual to include "'all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street.'" Pet. App. 15a (quoting Manual, note 1, at I-1).

The court reasoned that the retroreflective tape installed on the existing crossbucks under the 1989 Program is a "marking used to warn traffic of railroad crossings." *Id.* It observed that the "point of the 1989 program was that the addition of retroreflective tape to crossbucks would provide traffic with an additional, different warning of railroad crossings," *id.*, by reflecting light back from the far side of the crossing. Pet. App. 13a. The court noted FHWA's research with retroreflective material installed on the back side of crossbucks and their posts, which revealed that "'[t]he resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing'" from 200 to 300 feet away. *Id.* (citation omitted). The court explained: "Unlike the circuitry in *Easterwood*" that this Court held insufficient to trigger pre-emption, "the retroreflective tape at the Front Street crossing actually provided motorists warning of the crossing." Pet. App. 17a.

b. The court also considered an August 2, 2000 letter from Shelley J. Row of FHWA, elicited by petitioners' expert, K.W. Heathington. Heathington had written a brief letter to Row on June 27, 2000, enclosing two photographs of the Front Street crossing and stating only that "[i]n my opinion, the tape which is used in this fashion is not a traffic control device as defined by the [Manual]. ... I am hoping that you being from FHWA can confirm this conclusion about the use of the tape." Pet. App. 17a (citation and internal quotation marks omitted).

Heathington did not explain the purpose of his inquiry, and Row apparently understood the letter as a request for confirmation that the application of retroreflective tape would not be inconsistent with the

standards for "traffic control devices" set forth in the Manual. Row's brief response stated only that under the then-current version of the Manual (which had not yet been updated to include the retroreflective tape requirement for crossbucks),[7] " 'retroreflective tape is not considered a traffic control device and therefore its use around a traffic sign post *does not conflict with* the standard in the [Manual].' " Pet. App. 17a-18a (citation omitted) (emphasis added). Row did not consider or address whether the tape or signs would constitute a "warning device" for purposes of federal pre-emption.

Petitioners argued that the Row letter should be considered as support for their position under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The court rejected that argument. It held that Row's letter was "conclusory" and contained "no reasoning and no reference to authority of any kind," and that its reference to the standards for traffic control devices in the Manual was "opaque and unexplained." Pet. App. 18a. The court also observed that petitioners' interpretation of that letter would be in tension with a previous and more specific FHWA letter concerning the 1989 Program, which repeatedly called the tape a "device" and described its use as a warning signal. Pet. App. 18a-19a. The court concluded that it could not "ascribe any persuasive value to" Row's letter under *Skidmore*. Pet. App. 19a. The court also pointed out that petitioners did not argue that Row's letter "is entitled to deference." Pet. App. 18a.

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[7] Amendments to the Manual in 2000 specifically required that all crossbucks be upgraded by use of retroreflective tape as the State of Texas initially required under the 1989 Program. *See* Manual § 8B.02 (Dec. 2000) *available at* http://mutcd.fhwa.dot.gov/pdfs/millennium/12.18.00/8.pdf.

c. Although UP introduced substantial evidence below that the Front Street crossbuck signs themselves were installed with federal funds as part of the 1977 Program, the court did not reach the question of whether the 1977 Program independently pre-empts petitioners' claims. *See* Pet. App. 20a. The court also agreed with the court of appeals' conclusion that petitioners' obstructed-visibility claim "is simply a restatement of its [pre-empted] claim that the warning at the crossing was inadequate." Pet. App. 27a.

REASONS FOR DENYING THE WRIT

The decision below is a fact-bound application of settled and properly stated rules. There is no split of authority within the lower courts or among the state and federal courts, and the issue has virtually no prospective significance because of subsequent grade crossing improvements in Texas that would pre-empt claims like these, even under petitioners' theory. In any event, the Supreme Court of Texas clearly reached the right result on these facts. The petition should be denied.

I. THE DECISION BELOW IS A FACT-BOUND AND CORRECT APPLICATION OF *EASTERWOOD* AND *SHANKLIN*

The decision below correctly states the standard for federal pre-emption articulated by this Court in *Easterwood* and *Shanklin*. *See* Pet. App. 2a & n.4. The Texas Supreme Court's application of that well-settled law to these particular facts would not merit review even if it were flawed in some way. But the decision is also plainly correct. Petitioners' argument rests on two essential premises: (1) that an upgrade to an existing warning device cannot constitute the "installation" of a

warning device under the *Easterwood* pre-emption test; and (2) that retroreflective tape affixed to a crossbuck sign is not, by itself, a warning device. Both premises are wrong.

1. Petitioners effectively concede, as they must, that the reflectorized crossbuck signs located at the Front Street crossing at the time of the accident were "warning devices" within the meaning of the regulations, and that if "federal funds participate[d] in the installation of" those signs then these claims are pre-empted. *Easterwood*, 507 U.S. at 671. Petitioners argue that the retroreflective tape, standing alone, is not a warning device. But even if the tape affixed to the Front Street crossbucks were not a separate warning device, the *sign with tape* plainly is—and the application of the tape to a sign effectively "installs" a new and upgraded warning device that the federal government has paid for and that FHWA has therefore approved. As the Supreme Court of Texas recognized, such "enhancement ... of an existing sign to meet FHWA requirements" using federal funds constitutes "approval of 'the type of warning device to be installed' within the meaning of subsection (b) of the Grade Crossing Design regulations," and therefore pre-empts state law. Pet. App. 19a-20a.[8]

Petitioners' attempted distinction between new installations and mere "upgrades" is untenable. The regulations provide that when "Federal-aid funds

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[8] *Amici Curiae* Constitutional and Administrative Law Scholars suggest that the FRSA should be interpreted to preclude pre-emption if FHWA were to approve warning device requirements "laxer than the minimal requirement of crossbucks." Br. of *Amici Curiae* at 21. That question is not remotely presented by this case.

participate in the installation of" warning devices then "the type of warning device to be installed ... is subject to the approval of FHWA." 23 C.F.R. § 646.214(b)(3)(4). Federal pre-emption is triggered by, and co-extensive with, FHWA's right to approve the warning devices installed with federal funds. *See Easterwood*, 507 U.S. at 670-71. Petitioners' argument rests on a miserly construction of the word "installation" that would deny FHWA the authority to approve upgrades to existing warning devices. But an upgrade like the one at the Front Street crossing is effectively the "installation" of a new warning device that is different from the warning device that was there before.

Petitioners' contrary interpretation has absurd consequences. On petitioners' view, if FHWA had approved a plan to remove existing crossbucks at Front Street, upgrade them with retroreflective tape, and then stick them back in the ground, then state law would be pre-empted; but because the tape was affixed without removing and then re-planting the crossbucks there is no FHWA funding/approval authority and no pre-emption. The text of the regulation does not support such a crabbed and nonsensical interpretation. In both scenarios, FHWA funds have "participated in the installation" of the upgraded device that now stands at the Front Street crossing. And in both cases, the end result—the upgraded crossbuck—is unquestionably a "warning device" within the meaning of the regulations.

Petitioners' view is also inconsistent with FHWA's own interpretation of the regulations. In a December 2002 memorandum FHWA explained its conclusion, post-*Shanklin*, that FHWA may approve projects to improve passive crossings pursuant to 23 C.F.R.

§ 646.214(b)(4) "prior to the completion of a full diagnostic review provided such projects are certified [by the state] to be in compliance with the [Manual]." Tab 1 to Reply by Missouri Pacific Railroad Co. d/b/a Union Pacific Railroad Co. to the Br. on the Merits of the Limmer Parties as Respondents at 1, *Mo. Pac. R.R. Co. v. Limmer*, 289 S.W.3d 78 (Tex. 2009), attached hereto at Opp. App. 1a. The memorandum makes clear that FHWA believes that upgrade projects to passive crossings "fall under 646.214(b)(4)" no less than initial installations, and therefore are subject to FHWA approval. Opp. App. 4a.

> The Federal railway-highway grade crossing program is not static. ... [W]hen a passive device is installed, the State must continue to assess and improve crossings in accordance with 23 USC §130 and 23 CFR Parts 646.214 and 924. This may result in a crossing being *upgraded* with an active device *or other treatment*. Furthermore, changes in the [Manual] may lead to *changes in previously erected passive devices*. When this occurs, that is when a crossing is recommended for improvement and is actually improved with Federal funds, *then the new crossing device will be the device that is treated as being in compliance with Part 646*.

Opp. App. 2a (emphases added). Of course FHWA's approval authority is coextensive with pre-emption. *See Easterwood*, 507 U.S. at 670-71; *Shanklin*, 529 U.S. at 357.

Petitioners claim that *Easterwood* supports their position that the addition of a mere "component" of a larger warning device cannot trigger pre-emption

unless the component in isolation would also be a warning device, because this Court held that the motion detection circuitry installed in that case was insufficient to trigger pre-emption. But the motion detection circuitry in *Easterwood* was merely a mechanical prerequisite for automatic gate arms that were never installed. 507 U.S. at 671-72. Without the gate arms, the new warning device that FHWA approved (and that would have triggered pre-emption) was never completed. Of course the addition of a component does not constitute the installation of a new warning device, if other essential elements of the approved new warning device remain missing. But nothing in *Easterwood* suggests, as petitioners would have it, that a new warning device can never be "installed" through the addition of new components to an existing device. The retroreflective material installed at the Front Street crossing was the entire FHWA-approved upgrade, and fully completed (or "installed") the new device that FHWA approved.

2. In any event, the retroreflective material installed pursuant to the 1989 Program is itself a "warning device" within the meaning of the federal regulations. The material is clearly a "marking[] ... located at or in advance of grade crossings" that is designed to warn motorists of the presence of a crossing. 23 C.F.R. § 646.204. As the Supreme Court of Texas explained, that was the entire purpose of the 1989 Program. The implementing statute provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights *to focus attention to the presence of a nonsignalized crossing.*" Tex. Rev. Stat. Ann. art. 6370b, § 2 (Vernon

Supp. 1990) (emphasis added). Petitioners' suggestions that "[w]ithout a crossbuck, the tape does not indicate the presence of anything" and that "the tape itself does not 'regulate, warn, or guide traffic'" are nonsensical. Pet. 22-23. Of course if the sign were not present then the tape would be lying by the side of the road. But the retroreflective material *as affixed to existing crossbucks* pursuant to the 1989 Program does provide a warning. And surely the fact that the material was installed on a device already present at the crossing does not mean that it cannot be a warning device. A flashing light, for example, plainly would still be a warning device even if it were attached to a pre-existing crossbuck.

Petitioners' argument also consistently ignores the critical fact that this retroreflective material was "'affixed to the *backs* of crossbucks and their support posts.'" Pet. App. 13a (citation omitted) (emphasis added). The point of the 1989 Program was not to improve or upgrade the warning already delivered by the crossbucks facing the motorist; it was to provide approaching motorists with an entirely *new* warning, from the far side of the tracks, that would reflect light and "'flicker[]'" upon the presence of a moving train. *Id.* (citation omitted).

3. Petitioners erroneously assert that the court below "disregarded the FHWA's conclusion that retroreflective tape is *not* a traffic control device." Pet. 26. That "conclusion" is supposedly embodied in a brief letter (the "Row letter") written by the director of FHWA's Office of Transportation Operations in response to a cryptic inquiry from petitioners' expert, on the eve of trial in this case. Petitioners now argue that this purported agency interpretation is "entitled

to deference" under "*Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)." Pet. 27.

Petitioners have forfeited this argument. In their briefing to the Supreme Court of Texas, petitioners suggested that the Row letter should be considered under *Skidmore*, 323 U.S. at 140, an argument the court rejected. *See* Br. on the Merits of the Limmer Parties as Resps. at 22, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009); Pet. App. 18a-19a. Petitioners did not argue below, as they do before this Court, that the letter is entitled to *Auer* deference. And this would not be an appropriate case to consider forgiving the waiver. The Supreme Court of Texas specifically noted that petitioners had not argued for deference beyond *Skidmore*, *see* Pet. App. 17a-18a, so there is no decision below that even considers the issue. Petitioners suggest nothing about the *Auer* issue that independently merits review. And if petitioners had raised this argument for the first time in the Supreme Court of Texas, and that court had held it to be waived, this Court would now be jurisdictionally precluded from considering the issue under the adequate-and-independent-state-ground doctrine. Petitioners should not be rewarded for sandbagging the *entire* state judicial process rather than just part of it.

The Supreme Court of Texas also correctly found that the Row letter has no "persuasive value." Pet. App. 19a. Petitioners' expert's exceedingly oblique inquiry did not mention § 646.214(b) or the 1989 Program pursuant to which the upgrade had been made, nor suggest in any way that petitioners were seeking FHWA's opinion as to whether federal funds "participated in the installation of a warning device"

under the 1989 Program. Row's cursory response indicates that she understood petitioners' question to be focused on whether the use of retroreflective tape would be inconsistent with the safety standards set forth in the Manual—not whether federal funding of retroreflective upgrades triggers pre-emption. *See* Pet. App. 17a-18a. As explained above, a far more formal 2002 FHWA memo clearly indicates that the agency believes that upgrade projects *are* covered by § 646.214(b).

4. Finally, petitioners' (and *amici*'s) invocation of "the presumption against preemption" is a red herring. *See* Pet. 29-30. That presumption applies in determining the pre-emptive scope of a federal law or regulation. This Court *applied* the presumption against pre-emption when interpreting the pre-emptive scope of the regulations in *Easterwood*, and indeed rejected a more sweeping pre-emption theory offered by the railroads on the basis (in part) of that presumption. *See Easterwood*, 507 U.S. at 668.

In the limited context of crossings where § 646.214(b)(3) or (4) applies, however, this Court held that the presumption against pre-emption was overcome. Those provisions " 'cover the subject matter of adequate safety devices at crossings that have been improved with the use of federal funds,' " *Shanklin*, 529 U.S. at 354 (quoting U.S. *Easterwood* Br. at 23), and establish "a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject," *id.* at 357.

Because this Court has already interpreted the regulation, the task of the court below was to apply this Court's decisions faithfully to the evidence before it, and to determine whether the Front Street crossing

"ha[s] been improved with the use of federal funds." It was not obliged (or even permitted) to skew that analysis in a manner that would disfavor pre-emption.

II. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANY OTHER COURT

The unanimous decision of the Supreme Court of Texas does not conflict with any other authority. The decisions on which petitioners rely apply settled law to very different factual settings, and there is nothing among those few decisions to suggest that any other appellate court in the Nation (state or federal) would reach a different result on these facts. Petitioners' asserted "split" is therefore entirely illusory.

1. The Eighth Circuit's decision in *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995), does not conflict with the decision below. The federally-funded crossing improvement project at issue in that case called for replacing existing flashing light signals with larger lenses and adding active warning devices—automatic gates—at a particular crossing. Federal funds were used to install one component of that plan—the larger lenses—but a fatal accident occurred before the automatic crossing gates could be installed.

As in *Easterwood*, only one component of the FHWA-approved plan had been implemented at the time of the accident. Straightforward application of *Easterwood* to those facts led the Eighth Circuit to conclude that the mere replacement of the lenses, without installation of the automatic gates, did not trigger pre-emption. Where the federally-funded upgrade plan called for larger lenses *and* automatic

gates, "the exchange of a single component part" (the lenses) did not amount to "installation of a warning device" for purposes of triggering pre-emption. *Id.* at 867. "Under *Easterwood*, the regulations, and the public safety policy behind the FRSA," the court held, "preemption occurs when *all* the devices prescribed in the [FHWA]-approved upgrade plan are installed and operating." *Id.* (emphasis added).

The decision below is perfectly consistent with *Malone*. In *Malone*, FHWA had implicitly determined that the larger lenses would not provide an adequate warning to motorists at that crossing without the addition of automatic gates as well. Because the warning devices FHWA considered necessary were never installed (as in *Easterwood*) there was no pre-emption. In this case, FHWA's approval of the 1989 Program reflects its determination that the existing devices, in combination, *would* be adequate if reflectorized tape were added to the backs of the existing crossbucks. Unlike *Malone* and *Easterwood*, the installation of reflectorized material was the entire federally-approved plan, and it was fully implemented.

The petition makes much of the *Malone* court's statement that "like the circuitry installed in *Easterwood*, we do not believe the exchange of a single component part of the lights in place before the upgrade was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)." Pet. 16. Petitioners' reliance on this dictum is misplaced. In the context of *Malone*'s actual holding and the reference to *Easterwood*, the best reading of that statement is that there was no installation of a "warning device" within the meaning of the pre-emptive regulations *because the lights were only one part of the upgrade plan.* There is

no hint in *Malone* that a federally-funded upgrade that called for increasing the size of the warning lights, and nothing more, would not have triggered pre-emption. One of petitioner's other favorite cases correctly interprets the holding of *Malone*: that "in order for preemption to apply, federal funds must be used in the installation of warning devices and the warning devices must be installed and fully operational." *Boomsma v. Dakota, Minn. & E. R.R. Corp.*, 651 N.W.2d 238, 243 (S.D. 2002), *abrogated in part on other grounds by State v. Martin*, 683 N.W.2d 399 (S.D. 2004).

Finally, even if one were to subscribe to petitioners' wooden interpretation of the *Malone* dictum it would not demonstrate a conflict between *Malone* and the decision below. The addition of reflectorized material to crossbucks that previously had no such markings is not "the exchange of a single component part" of an existing warning device.

2. Neither of the two state supreme court decisions on which petitioners rely fares any better. *Boomsma* involved three sets of tracks at a crossing. Although two of the three sets of tracks were fitted with "overhead flashing warning lights paid for with federal funds, ... those warning lights were not wired to operate" on the third set where the accident actually happened. 651 N.W.2d at 243. The court found that the third set of tracks was a distinct crossing, not just a part of a single crossing that had been upgraded pursuant to the federally-approved plan. *Id.* at 244. The railroad was able to show that federal funds *had* been used to add "rubberized mats" to the third crossing. But the court sensibly held that those mats were not warning devices. *Id.*

Duncan v. Kansas City Southern Railway Co., 773 So. 2d 670 (La. 2000), *cert. denied*, 532 U.S. 992 (2001), is even further afield. The court there affirmed the trial court's finding that the railroad had not proved that the crossing in question was actually upgraded with federal funds. *Id.* at 680. A 1980 project called for the installation or replacement of crossbucks in the state. *Id.* But with respect to the particular crossing in question, the railroad could prove only that federal funds had contributed to the addition of an "inventory number." *Id.*

Petitioners cite *Boomsma* and *Duncan* for the broad proposition that "federally funded maintenance or improvement activities do not support preemption if the item added is not itself a 'warning device.'" Pet. 17-18. But neither case involved a federally-funded "improvement" *of a warning device*. In both cases the federal funds were used only on items with no role in warning motorists. Neither case has any relevance to the issue presented here: whether a federally-funded upgrade of an existing warning device constitutes an "installation" for pre-emption purposes.

In any event, there would be no split in authority even accepting petitioners' mischaracterization of the holdings in *Boomsma* and *Duncan*. In this case, unlike those cases, the Supreme Court of Texas correctly concluded after a lengthy discussion that the reflective material installed at the Front Street crossing *was* itself a "warning device" within the meaning of the federal regulations. Pet. App. 12a-17a. Petitioners' own cases well illustrate that the petition seeks, at most, fact-bound error correction on that point.

3. Finally, petitioners point to two unpublished orders of federal district courts in Texas suggesting

that retroreflective tape, without more, may not be a "passive warning device." *See Lesly v. Union Pac. R.R. Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004); *Enriquez v. Union Pac. R.R. Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004). In *Lesly*, the district court denied summary judgment because the railroad had not established that federal funds were used to install retroreflective tape at the crossing in question. The court then stated *in dicta* that a trial would be necessary in any event because the plaintiffs "have provided evidence that ... such tape, in and of itself, is not a warning device" as defined in the Manual, and "the evidence presented here does not clarify whether the process of merely adding retroreflective tape to crossbucks constitutes 'installing' a 'warning device.'" 2004 U.S. Dist. LEXIS 23018, at *12. In other words, the *Lesly* court believed (perhaps erroneously) that the pre-emption issue turned on evidence and disputed issues of fact, and denied summary judgment. The opinion does not clearly resolve the legal question.

Enriquez subsequently relied on the vague dicta in *Lesly* to hold that "[i]n the same sense that a pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." 2004 U.S. Dist. LEXIS 28989, at *45. But the decision contains little independent analysis. The Supreme Court of Texas considered both *Enriquez* and *Lesly* and properly found them unpersuasive. Pet. App. 19a n.60.

In *McDaniel v. Southern Pacific Transportation*, 932 F. Supp. 163, 167 (N.D. Tex. 1995)—the only published federal decision on point—the district court recognized, consistent with the decision below, that the

federally-funded retroreflective upgrades made pursuant to the 1989 Program trigger pre-emption. The Fifth Circuit has not weighed in on the question, and there is no reason to believe that other federal district courts in Texas would follow a poorly reasoned unpublished order rather than the published opinion in *McDaniel* or the thorough analysis of the Supreme Court of Texas. To characterize petitioners' asserted federal/state-court "split" on this issue as embryonic would be generous.[9]

III. THE REAL QUESTION PRESENTED IS EXCEEDINGLY NARROW AND UNLIKELY TO RECUR

In any event, petitioners cannot credibly claim that these decisions demonstrate disagreement among the federal and state courts in Texas as to the proper *standard* for FRSA pre-emption. At most, any nascent split within Texas involves the narrow, fact-bound question of whether retroreflective tape added to crossbucks pursuant to the 1989 Program triggers pre-emption under the established standards articulated in *Easterwood* and *Shanklin*. That question is of vanishing prospective importance.

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[9] Petitioners' comparison of this case to *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), *see* Pet. 30, is thoroughly inapt. In *Bates*, this Court granted certiorari to resolve a longstanding (spanning two decades) and deep conflict among numerous federal courts of appeals and state supreme courts on the fundamental question whether the Federal Insecticide, Fungicide, and Rodenticide Act pre-empts state tort claims relating to crop injury. This Court has already twice spoken to the pre-emptive scope of § 646.214(b) and, as explained, the only arguable "split" here rests on two unpublished district court decisions.

Under Texas law, negligence claims are subject to a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). Under the 2004 Program, most existing crossbucks at public passive crossings in Texas were removed and replaced with completely new crossbuck signs that comply with updated engineering standards. The question of whether the 1989 Program triggers FRSA pre-emption therefore will soon be academic, if it is not already. Most negligence claims involving accidents that pre-date the 2004 Program would have to have been brought no later than 2006. The chance that any significant number of such cases remain in the judicial pipeline at this point is quite small. And any negligence claim arising out of an accident at a crossing updated pursuant to the 2004 Program would presumably be pre-empted by the federal regulations, even under petitioners' theory.

Petitioners note that *amici* supporting UP "attested to the importance" of this case in urging the Supreme Court of Texas to grant review. Pet. 32. The court of appeals' decision below *was* important. It had decided the pre-emption issue in a manner that conflicted with *Easterwood* and *Shanklin* and threatened to spawn confusion among the lower courts. But the Supreme Court of Texas granted review and reversed that problematic holding. What was once a potentially interesting case has now become a routine and fact-bound application of settled law, completely consistent with this Court's precedents and the decisions of other courts.[10]

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[10] Even if petitioners were to obtain a ruling from this Court that the 1989 Program does not trigger FRSA pre-emption, UP would be entitled to a remand on the question whether the 1977

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Program pre-empts petitioners' claims, an issue that the Supreme Court of Texas declined to reach.

APPENDIX

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December 26, 2002 FHWA Memorandum (Tab 1 to Reply of Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company to the Brief on the Merits of the Limmer Parties as Respondents, *Mo. Pac. R.R. Co. v. Limmer*, 299 S.W.3d 78 (Tex. 2009)) 1a

[Logo omitted]
U.S. Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: INFORMATION: Funding of Passive Improvements at Railway-Highway Crossings

Date: December 26, 2002

[Original signed by:]
From: Mary E. Peters
Administrator
(HOA-1)

Reply to: HAS-10/HCC-30

To: Directors of Field Services
Division Administrators
Federal Lands Highway
Division Engineers

This is in follow-up to Office of Safety's February 13, 2001, memorandum, "Approval of Federal Funds of Highway-Rail Grade Crossing Improvements" regarding the agency's position and necessary action following the Supreme Court's ruling relating to Norfolk Southern Railway Co. v. Shanklin. The Office of the Chief Counsel has concluded that the FHWA may fund passive improvement projects for railway-highway grade crossings, prior to the completion of a full diagnostic review provided such projects are certified to be in compliance with the Manual for Uniform Traffic Control Devices (MUTCD). This is

consistent with all statutory [23 U.S.C. §§ 109(e) and 130(d)] and regulatory requirements, and recognizes the discretion and expertise of the States in selecting warning devices in accordance with either 23 CFR §§ 646.214(b)(3) or (b)(4) when they seek Federal funds for crossing improvement projects. Passive devices installed will be treated as being in compliance with 23 CFR Part 646.

The Federal railway-highway grade crossing program is not static. In fact, the program envisions a continuing assessment of all railway-highway grade crossings and provides for improvement of crossings as appropriate. Thus, even when a passive device is installed, the State must continue to assess and improve crossings in accordance with 23 USC §130 and 23 CFR Parts 646.214 and 924. This may result in a crossing being upgraded with an active device or other treatment. Furthermore, changes in the MUTCD may lead to changes in previously erected passive devices. When this occurs, that is when a crossing is recommended for improvement and is actually improved with Federal funds, then the crossing device will be the device that is treated as being in compliance with Part 646.

This action is consistent with the decision in Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344, 146 L.Ed. 2d 374, 120 S.Ct. 1467 (2000), in which the Supreme Court disagreed with the Department's contention that installation of passive devices in the absence of a full diagnostic review was not covered by the 23 CFR §§646.214(b)(3) and (4). This is also consistent with the legislative history of the railway-highway crossings program, where Congress recognized that passive devices would continue to be

used at most of the Nation's crossings. Where a diagnostic review or other analysis is not performed, approval of passive device projects funded by the FHWA is conditioned on a certification by the States that the warning device(s) to be installed or upgraded meets the Federal standards set forth in the MUTCD, therefore, fulfilling the requirements of 23 U.S.C. § 109(e).

When Congress established the railway-highway grade crossing program by enacting 23 U.S.C. § 130(d), it recognized the distinction between crossings needing active devices, and the much larger number of crossings needing only passive devices, observing that "[f]ew of these lightly-traveled crossings, therefore, have sufficient accident potential to justify train-activated protection," and provided funding "to be devoted to providing adequate signing at all such crossings." 1973 U.S.C.A. 1859, at 1892-93. Our decision that permitting the funding of MUTCD compliant passive device projects without a diagnostic analysis is consistent with the congressional hope and expectation that "every railroad crossing in America will be equipped with adequate warning signs located at a proper distance from the crossings, and new high visibility signs at the rail-highway crossing proper." Id.

We recognize that the FHWA has frequently required a full diagnostic review as a prerequisite to a finding that a particular crossing is "adequate" for purposes of Federal funding. However, a reexamination of the law and our regulations in light of the Shanklin decision leads us to conclude that this is not the case. Our rules do set forth more extensive requirements for funding active grade crossing devices

and for determining the appropriate device to be installed as part of any highway construction. The Supreme Court determined that the funding of passive devices under these circumstances was within the more generalized reviews envisioned by 23 CFR § 646.214(b)(4). Since the majority of all crossings fall under the provisions of (b)(4), passive devices would satisfy the requirement as the appropriate type of warning device. Signing and marking projects could proceed without further review upon a statement by the State DOT that the crossings to be signed and marked fall under 646.214(b)(4).

The railway-highway program is not in the same place that it was in 1972. Rather, it is quite mature and States have a wealth of information with which to make judgments and set priorities about railway-highway grade crossings. With this information, States can decide which crossings can best be treated with passive devices, either temporarily or permanently, and which might require a more careful review leading other improvements. We believe that the current program, by prioritizing grade crossing reviews, assuring that the potentially more hazardous crossings are addressed first, and warning devices fully compliant with the MUTCD are provided at every crossing, complies with 23 U.S.C. §§109(e) and 130, and 23 C.F.R. §646.214.

If you have questions or wish additional information, please contact Mr. Rudolph M. Umbs at (202) 366-2177 or Debra Chappell at (202) 366-0087 in the Office of Safety or Mr. Raymond W. Cuprill at (202) 366-1377 in the Office of Chief Counsel.